



The University of the State of New York

The State Education Department

State Review Officer

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No. 13-200

Application of a STUDENT WITH A DISABILITY, by her parent, for review of a determination of a hearing officer relating to the provision of educational services by the XXXXXXXXXX

Appearances:

Law Offices of Regina Skyer and Associates, attorneys for petitioner, Jamie Chlupsa, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Brian J. Reimels, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her daughter's tuition costs at Imagine Academy (Imagine) for the 2012-13 school year. Respondent (the district) cross-appeals from the IHO's determination that the district bore the burden of persuasion regarding whether equitable considerations supported the parent's request. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, the parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between the parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due

process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between the parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student has received a diagnosis of autism and demonstrates difficulties with cognition, academics, sensory regulation, language, motor skills, activities of daily living (ADL), and social/emotional/behavioral functioning (Tr. pp. 105, 110, 144-45, 201-02, 212; Dist. Ex. 9; Parent Ex. K). When the student was five years old, the parent placed the student at Imagine

where she continued to attend through the 2012-13 school year (Tr. p. 200; Dist. Ex. 9 at p. 1; Parent Ex. G).¹

On March 29, 2012, the CSE convened to conduct the student's annual review and to develop her IEP for the 2012-13 school year (Parent Ex. E). Finding the student remained eligible for special education and related services as a student with autism, the March 2012 CSE recommended a 12-month school year program in a 6:1+1 special class placement in a specialized school with the following related services: three 45-minute sessions per week of individual speech-language therapy, two 45-minute sessions per week of individual occupational therapy (OT), and one 45-minute session per week of OT in a group (Parent Ex. E at pp. 6-7, 11).² The March 2012 CSE determined the student did not require strategies or supports to address her behavioral needs, and that the student did not require a behavioral intervention plan (BIP) (id. at p. 2). The IEP indicated the student would participate in alternate assessment due to her significant cognitive delays (id. at pp. 8-9).

By final notice of recommendation (FNR) dated June 14, 2012, the district summarized the services recommended by the March 2012 CSE for the 2012-13 school year and notified the parent of the particular public school site to which it had assigned the student (Dist. Ex. 11).

By letter dated June 15, 2012, the parent informed the district of her intention to continue the student's enrollment at Imagine for the 2012-13 school year and that she would seek funding for the placement and transportation from the district if the district did not address the substantive and procedural errors in the IEP (Parent Ex. C at pp. 1-2). Moreover, the parent asserted various reasons for her rejection of the March 2012 IEP (id.). The parent also indicated she had not yet received the IEP or an FNR from the district (id. at p. 2).³

In a letter dated August 22, 2012, the parent again advised the district of her intent to continue the student's enrollment at Imagine for the 2012-13 school year and seek public funding for the placement (Parent Ex. D at pp. 1-2). The parent indicated the reasons for rejecting the March 2012 IEP and asserted that the district denied the student a free appropriate public education (FAPE) (id. at p. 2). The parent also indicated that she had received the FNR from the district and attempted to schedule a site visit at the assigned public school but was unable to because it was closed for the summer (id.).

¹ The Commissioner of Education has not approved Imagine as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

² The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

³ By letter dated June 21, 2012, the district requested that the parent agree to amend the student's IEP to reflect that the student had been accepted at a summer program for summer 2012 (Dist. Ex. 4; see Dist. Ex. 3). A copy of the amended IEP does not appear in the hearing record; however, the parent agreed to waive any claims regarding the student's placement for summer 2012 in consideration for the district's agreement to place the student at the summer camp at district expense (Dist. Ex. 5; see Dist. Ex. 6). Accordingly, this decision addresses only the 10-month 2012-13 school year and the adequacy of the March 29, 2012 IEP (Parent Ex. E).

On September 1, 2012, the parent executed an enrollment contract with Imagine for the student's attendance during the 2012-13 school year (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated November 6, 2012, the parent alleged that the district failed to offer the student a FAPE for the 2012-13 school year and requested an impartial hearing (Parent Ex. A). Generally, the parent asserted that the CSE developed its program recommendation based on the programs available within the district, rather than the student's individual needs (id. at p. 3). Specifically, the parent alleged that the CSE relied upon insufficient evaluative information and inappropriately relied solely on teacher estimates to determine the student's functional levels of performance (id.). The parent further alleged that the student required strategies to address her behaviors that interfered with learning, but the CSE did not provide modifications and supports to adequately address the student's management needs, nor did it develop a BIP (id.). The parent also alleged that the IEP goals were inadequate to address the student's needs and that the goals could not be implemented in the recommended 6:1+1 special class placement (id. at pp. 3-4). The parent also alleged that the student required 1:1 instruction using an applied behavior analysis (ABA) methodology and that the IEP failed to offer the student a FAPE by recommending no specific methodology and a 6:1+1 placement (id. at p. 4). The parent next alleged that State regulations required the IEP to include parent counseling and training and transitional support services to support the student's transition from a private school to a public school (id.). Additionally, with respect to the assigned public school site, the parent alleged that the functional grouping at the site was inappropriate, that the school did not offer instruction using ABA methodology and that the public school site was too large and contained too many students for the student, such that the student would not receive educational benefits (id. at p. 5). The parent also alleged that the unilateral placement at Imagine was appropriate and that equitable considerations would not bar reimbursement (id.).⁴

B. Impartial Hearing Officer Decision

After a pendency hearing held on December 19, 2012, an impartial hearing was convened on April 30, 2013 and concluded on August 6, 2013 (Tr. pp. 1-247).⁵ In a decision dated September 10, 2013, the IHO found that the district offered the student a FAPE for the 2012-13 school year (IHO Decision). The IHO found that the program recommended for the student was derived by the CSE from among the options permitted by State regulations and that a 6:1+1 classroom placement was capable of implementing the student's program, such that it was unnecessary to consider additional placement options (id. at pp. 13-14). With regard to the sufficiency and consideration of evaluative information, the IHO found that the CSE properly relied upon input from the student's then-current classroom teacher at Imagine and the principal of Imagine for information about the student's needs and abilities where a more formal

⁴ The parent also asserted her right to public funding for the student's placement at Imagine pursuant to the stay put (pendency) provision of the IDEA (Parent Ex. A at p. 2).

⁵ The IHO issued an order, dated December 21, 2012, noting that the parties agreed that Imagine constituted the student's pendency placement pursuant to an unappealed IHO decision regarding the 2011-12 school year and ordering the district to fund the student's placement at Imagine, retroactive to the date of filing of the parent's due process complaint notice (Interim IHO Decision).

assessment of the student was not possible (IHO Decision at p. 11). The IHO next found that the lack of specific modifications and support to address the student's management needs on the IEP did not rise to the level of denying the student a FAPE because the student's interfering behaviors "did not necessarily warrant the creation of strategies for inclusion in [the student's IEP]," and the CSE permissibly concluded that a BIP was not needed to address the student's behaviors (id. at pp. 11-12). With respect to the annual goals in the IEP, the IHO found that although the goals were "perhaps unrealistically optimistic," and that the goals were not as detailed as might be desired, they were "sufficient as a guide to the areas that should be addressed" and did not rise to the level of denying the student a FAPE (id. at p. 12). The IHO also determined that the recommended 6:1+1 special class placement was appropriate because although the student had received only ABA instruction since turning she entered Imagine at the age of five, the hearing record did not indicate that the student needed 1:1 instruction using an ABA methodology to receive any educational benefits, and other teaching methods may have been appropriate to meet the student's needs (id. at p. 13). The IHO then found that although in violation of State regulation, the lack of parent counseling and training on the IEP did not deny the student a FAPE, noting that the hearing record established that the service was offered at the assigned public school site (id. at pp. 12-13). Finally, with respect to the assigned public school site, the IHO found that the hearing record showed that that the student could have been appropriately grouped with other students at the assigned public school site and, further, that the size of the school building at the assigned school and the number of students did not constitute a denial of FAPE, noting that the relatively larger physical plant of the public school compared to Imagine was, "perhaps, one of the elements of receiving a public education" (IHO Decision at p. 15).

IV. Appeal for State-Level Review

The parent appeals and contends that the IHO erred in finding that the district offered the student a FAPE during the 2012-13 school year, and further contends that her unilateral placement of the student at Imagine was appropriate and equitable considerations do not bar reimbursement. Generally, the parent asserts that the IHO misapplied relevant law, misapprehended relevant facts, and improperly weighed the evidence in determining that the district offered the student a FAPE.

More specifically, the parent contends that the IHO erred in finding that the evaluative information before the March 2012 CSE was sufficient because the CSE did not conduct a classroom observation of the student and did not conduct a requested physical therapy (PT) evaluation. The parent also asserts that the CSE failed to "properly" consider evaluative information provided by Imagine. Further, the parent contends that the IEP failed to include sufficient environmental modifications and human or material resources to address the student's management needs or strategies for addressing the student's interfering behaviors. The parent also contends that the IHO erred in finding that the student's behaviors did not warrant a BIP because the behaviors described in the reports and information before the CSE indicated that the student's behavior interfered with her learning, and that the failure to conduct an FBA and develop a BIP rose to the level of a denial of a FAPE in this instance because the IEP did not otherwise identify or address the student's interfering behaviors by way of annual goals or through the provision of modifications or additional resources such as an individual paraprofessional. Next, the parent contends that the IHO erred in finding that the IEP goals were

a sufficient guide to the areas that needed to be addressed for the student, and that some of the short-term objectives contained in the IEP did not relate to the corresponding annual goals. The parent also asserts that the goals were developed by Imagine for a 1:1 setting and were not modified by the CSE to be implemented in the recommended 6:1+1 setting. In any event, the parent also contends that additional goals were needed to address the student's needs in math, reading, writing, gross motor skills, and OT. Regarding the recommended 6:1+1 special class placement, the parent asserts that where the majority of the evaluative information before the CSE indicated a need for instruction in a 1:1 ratio and using ABA methodology, the March 2012 IEP—by offering a 6:1+1 special class placement, no recommendation for the use of instruction utilizing ABA methodology, and no 1:1 paraprofessional—denied the student a FAPE. Finally, the parent contends that the IHO erred in finding the lack of parent counseling and training on the IEP did not deny the student a FAPE because, considered in conjunction with the other errors committed by the CSE, the failure to include the service amounted to a denial of FAPE, and retrospective testimony regarding the ability of the assigned public school site to provide it cannot be used to rehabilitate the defective IEP.

With respect to the assigned public school site, the parent contends that the district does not have "carte blanche" to assign the student to a school that cannot implement the IEP's requirements, and that finding the student to be "very similar" to other students is not sufficient to show that the student could be adequately grouped at the assigned school. The parent further asserts that the assigned school could not provide the student with the 1:1 instruction using ABA methodology that the student needed. Further, the parent asserts that the IHO erred in finding that the size of the assigned school would not deprive the student a FAPE because the parent raised legitimate concerns regarding the student's safety as a result of her food allergies, and the need for a 1:1 paraprofessional to prevent her from eating food that could harm her. The parent also contends that the IHO erred in relying on retrospective testimony regarding services available at the assigned public school site to rehabilitate deficiencies in the student's IEP and determine that the public school could have appropriately implemented the IEP.

Next, the parent asserts that Imagine was an appropriate unilateral placement because it met the student's individual needs including her needs for instruction utilizing particular methodologies, a sensory diet, communication, behaviors, rigidity, generalization, 1:1 support, related services; and that the student made progress. Regarding equitable considerations, the parent asserts that she cooperated with the CSE, acted in good faith, made the student available for evaluation, arranged for Imagine staff to participate in the CSE meeting, visited the recommended public school site, did not sign a contract with Imagine before the March 2012 CSE meeting. As relief, the parent requests that an SRO order the district to directly fund the cost of the student's tuition at Imagine for the 2012-13 school year, asserting that she sufficiently established her inability to front the costs of the student's private education.

The district answers the petition and denies the parent's material allegations therein. In addition, the district contends that the IHO's findings that it offered the student a FAPE for the 2012-13 school year are supported by the hearing record. The district also asserts that the district was not required to show that the IEP could have been implemented at the assigned public school site when the parent unilaterally placed the student at Imagine without the student ever attending the assigned school and, in any event, the public school was appropriate to meet the student's

needs. Further, the district contends that Imagine was not an appropriate unilateral placement, and that equitable considerations do not support an award of tuition reimbursement because the parent did not seriously consider a public school placement. With regard to relief, the district asserts that the hearing record is unclear as to the totality of the financial resources and support available to the student, such that the parent's need for direct funding of the costs of the student's tuition has not been established.

In a cross-appeal, the district contends that the IHO erred in placing the burden of persuasion with regard to equitable considerations upon the district. In an answer to the cross-appeal, the parent contends that the IHO correctly placed the burden upon the district.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and the parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; R.E. v. New York City Dep't. of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245; A.H. v. Dep't of Educ., 394 Fed. App'x 718, 720-21, 2010 WL 3242234 [2d Cir. Aug. 16, 2010]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008], aff'd, 361 Fed. App'x 156, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp.

2d 415, 419 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving the parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; G.B. v. Tuxedo Union Free Sch. Dist., 751 F. Supp. 2d 552, 573-80 [S.D.N.Y. 2010], aff'd, 486 Fed. App'x 954 [2d Cir. Oct. 18, 2012]; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. New York City Bd. of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008] [noting that a CSE must consider, among other things, the "results of the initial evaluation or most recent evaluation" of the student, as well as the "academic, developmental, and functional needs" of the student]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see also Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9).

A board of education may be required to reimburse the parents for their expenditures for private educational services obtained for a student by his or her the parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to the parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

VI. Discussion

A. Scope of Review

Briefly, it is necessary to note that the parent raises no arguments on appeal regarding the allegations in her due process complaint notice that the district denied the student a FAPE by (1) offering a program based on availability rather than the student's needs, and (2) failing to recommend transitional support services to assist the student in moving from a private school to a public school. Accordingly, these issues are not presented for review on appeal and the IHO's determination that the CSE properly determined that the recommended program could be implemented in a 6:1+1 special class has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).⁶

B. March 2012-13 IEP

1. Sufficiency of Evaluative Information

The parent asserts that the IHO erred in finding that the March 2012 CSE had sufficient evaluative material before it to identify the student's needs and determine the student's skills

⁶ The parent's argument regarding transitional support services was not raised during the course of the hearing, and is without merit in any event, as such services are provided on a temporary basis to teachers "to aid in the provision of appropriate services to a student with a disability transferring to a regular program or to a program or service in a less restrictive environment" (8 NYCRR 200.1[ddd]; see 8 NYCRR 200.6[c]; 200.13[a][6]). The CSE recommended that the student attend a special class in a specialized school, with no indication in the hearing record that she would have any more interaction with nondisabled students in a public school than the student received at Imagine (see Parent Ex. E at pp. 8-9). Furthermore, "there is no requirement in the IDEA for a 'transition plan' when a student moves from one school to another" (E.Z.-L. v. New York City Dep't of Educ., 762 F.Supp.2d 584, 598 [S.D.N.Y. 2011]).

levels, that the CSE improperly relied solely on teacher estimates, and that the CSE should have conducted a classroom observation and a physical therapy evaluation of the student. The IHO concluded that the information obtained from the student's teacher and principal was appropriate and sufficient because "no proper assessment of [the student] was possible" (IHO Decision at p. 11). With respect to these contentions, a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree and at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). Any evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]; see Fort Osage R-1 Sch. Dist. v. Sims, 641 F.3d 996, 1004 [8th Cir. 2011]; Application of a Student with a Disability, Appeal No. 09-126 [noting that "a student's special education programming, services and placement must be based upon a student's unique special education needs and not upon the student's disability classification"]; Application of the Dep't of Educ., Appeal No. 07-018). Subject to certain exceptions, a school district must obtain informed parental consent prior to conducting an initial evaluation or a reevaluation (34 CFR 300.300[c]; 8 NYCRR 200.5[b][1][i]; see Letter to Sarzynski, 51 IDELR 193 [OSEP 2008]) and provide adequate notice to the parent of the proposed evaluation (8 NYCRR 200.5[a][5]).

In this case, the hearing record indicates that a February 2012 psychoeducational evaluation, a March 2012 Imagine Academy annual review report, and the student's 2011-12 IEP were before the March 2012 CSE (Tr. pp. 40-41, 54; Dist. Exs. 7-9; Parent Ex. K).^{7,8}

⁷ Both District Exhibit 7 and Parent Exhibit K are the March 2012 Imagine annual review; the version submitted into evidence by the district is incomplete and out of order (compare Dist. Ex. 7, with Parent Ex. K). However, as the March 2012 IEP contains goals identical to those contained in the version submitted by the parent but not in the version submitted by the district (compare Parent Ex. E at p. 5, with Parent Ex. K at p. 3, and Dist. Exs. 7; 8), and the district representative at the March 2012 CSE meeting testified that the goals were developed based on the annual review (Tr. p. 48), the hearing record indicates that the district was in possession of the full document and this decision will reference the version submitted by the parent.

⁸ The hearing record does not contain the student's 2011-12 IEP.

In a February 2012 psychoeducational evaluation, a district school psychologist described the student's then-current academic functioning, ADL skills, and social/emotional/behavioral functioning (Dist. Ex. 9). As part of the evaluation, the school psychologist attempted to administer the Stanford Binet-Fifth Edition (SB-V) to the student but "testing was abandoned due to [the student's] inability to comply and she seemed visibly upset" (id. at p. 2). According to the school psychologist, during the assessment session, the student did not follow directions or respond to questions but would rather "get out of her chair and walk away" (id. at p. 1). With the school psychologist's provision of verbal and physical prompts, the student sat down in her chair (id. at p. 2). The report indicated, according to the student's teacher, that the student's behavior during the assessment session might be a result of the disruption in the student's schedule (id.).

As part of the 2012 psychoeducational evaluation, the school psychologist noted that during an informal assessment the student identified some colors and letters of the alphabet but also noted that without teacher prompts the student would not have responded (Dist. Ex. 9 at p. 2). The student's teacher reported the student identified some sight words and prepositions, sometimes described familiar people, followed one-step directions with assistance, counted to ten with prompts, and recited all the letters of the alphabet (id.). The school psychologist reported the student was in constant motion and the student would "grunt and groan and at one point, she looked like she would cry" (id.). The report indicated the student was unable to remain seated and the use of a brushing technique appeared to calm the student (id.). The school psychologist reported the "teacher needed to constantly redirect her with verbal and visual prompts, as well as praise and encouragement" (id.).

The school psychologist, as part of the 2012 psychoeducational evaluation, reviewed a previous psychological evaluation dated March 2010 that indicated the student was "largely nonverbal" and had not responded to her name during the assessment, but with verbal and physical prompts, the student looked at the evaluator (Dist. Ex. 9 at p. 1). During the 2010 evaluation, the student engaged in self-stimulatory behaviors including hand flapping, rolling her head back and forth, and vocalizing (id.). The results of an administration of the Vineland Adaptive Behavior Scales-Second Edition (Vineland-2), with the student's mother serving as informant, indicated the student demonstrated overall skills in the low range in communication, daily living skills, socialization, and motor skills, which indicates well below average skill levels in these areas (id.).

The March 2012 CSE also reviewed a March 2012 Imagine annual review report in which the student's then-current classroom teacher described the student's functioning and progress in academics, sensory regulation, motor skills, and social/emotional/behavioral skills (Tr. p. 41; Parent Ex. K). The teacher reported the student engaged in behaviors including crying, scratching herself and others, and rocking her body (Parent Ex. K at p. 1). The teacher indicated the behaviors resulted from frustration, task avoidance, or when required to wait for a desired item (id.). The teacher noted that when the student had tantrums and cried, the student had difficulty expressing her needs, which in turn increased her frustration (id.). The teacher also noted that to assist the student to regulate and calm down that "maximum assistance is required," including sensory activities such as joint compressions, therapeutic music, and deep pressure (id. at pp. 1-2).

As part of the 2012 report, the teacher reported that during individual academic sessions the student maintained her attention and chose a reward upon task completion (Parent Ex. K at p. 2). Although, the student had improved in processing multisensory information from her environment, the student continued to demonstrate significant delays in sensory processing including being resistant to changes in routine, but she responded well to a visual schedule (id. at p. 6). The teacher reported that student demonstrated difficulties with social interactions and processing of visual and auditory information, tactile processing, balance and movement, and planning (id.). The teacher further reported that with the provision of proprioceptive and vestibular input, which was a part of the student's daily schedule and sensory diet, she was better able to self-regulate (id.). According to the teacher, the student had improved in following the classroom routine including following a visual schedule throughout the day to assist with comprehension and transitions (id. at p. 1). The teacher indicated the student required minimal prompting to use her schedule, had become more aware of her peers, enjoyed group and individual activities, responded to her name, and maintained eye contact (id.). Within a group setting, the student required assistance to maintain attention to a task, follow directions, and to wait her turn (id.). The teacher indicated the student required direct 1:1 instruction with trained professionals for the student to develop and acquire new skills (id. at p. 9).

In the speech-language therapy portion of the report, the student's speech-language pathologist described the student's language skills (Parent Ex. K at p. 4). According to the speech-language pathologist, the student used a picture exchange communication system (PECS) and verbal language as her primary means of communication (id.). With respect to pragmatic language, the student used language to request, respond, protest, and gain attention (id.). The speech-language pathologist noted that since the implementation of the PECS book during the 2011-12 school year, the student demonstrated significant improvement in initiating conversations (id.). The speech-language pathologist indicated that the student presented with fleeting eye contact, but the student maintained eye contact when addressed or engaged in an activity (id.). In the area of receptive language, the student processing and responsiveness to language had improved (id.). According to the speech-language pathologist, the student followed three-step directives and comprehended a variety of nouns, verbs, and adjectives (id.). With respect to expressive language, the student produced 5-10 words given the presence of a referent or within a context (id.). The report indicated that PECS enhanced the student's ability to communicate (id.). According to the speech-language pathologist, regarding PECS, the student navigated her book, selected and combined objects, and exchanged a sentence strip with a communication partner while she verbalized the corresponding utterance with minimal assistance (id.).

The testimony of Imagine's principal and the minutes of the March 2012 CSE meeting both indicate that the CSE discussed the student's functioning and instructional levels (see Tr. p. 116; Dist. Ex. 10). The minutes of the CSE meeting indicate that the March 2012 CSE reviewed the student's clinical profile and "spoke in detail with both the school and parent" (Dist. Ex. 10 at p. 1).⁹ In addition, the principal testified that the student's classroom teacher provided the March

⁹ I note that the hearing record contains reference to material contained in the meeting minutes that does not appear in the version submitted with the hearing record by the district for review by the SRO (compare Tr. p. 45, with Dist. Ex. 10 at p. 1). I remind the district that it must submit "a true and complete copy of the hearing

2012 CSE with information regarding the student's academic skills and behavior (Tr. p. 116). The parent contends that the March 2012 CSE relied solely on teacher estimates; however, a review of the March 2012 IEP establishes that the teacher estimates provided a detailed narrative description of the student's academic and related skills (see E. at pp. 1-2).

It is undisputed the district did not conduct a classroom observation of the student (Tr. p. 41; Answer ¶ 29). State and federal regulations require a CSE to consider "[o]bservations by teachers and related services providers" as part of an initial evaluation or a reevaluation of a student (34 C.F.R. § 300.305[a][1][iii]; see 8 NYCRR 200.4[b][1][iv] [requiring an "observation of the student in the student's learning environment . . . to document the student's academic performance and behavior in the areas of difficulty" as part of a student's initial evaluation]; 8 NYCRR 200.4[b][5][i], [ii][b] [requiring that the CSE, as part of an initial evaluation or reevaluation, review "existing evaluation data of the student including . . . classroom-based observations" to identify, what if any, additional evaluation data is needed to determine, among other things, the "present levels of academic achievement and related developmental needs of the student"])). As set forth above, the March 2012 CSE reviewed several evaluative reports that assessed the student in the areas of academics, ADL skills, motor skills, language, and social/emotional/behavioral functioning (see Dist. Exs. 8; 9; Parent Ex. K). The evaluative information reviewed by the March 2012 CSE and CSE member input provided sufficient information regarding the student's academic and related needs (see Dist. Exs. 1 at pp. 1-2; 8; 9; Parent Ex. K). According to the testimony of Imagine's principal, the classroom teacher and she provided information to the March 2012 CSE meeting regarding the student's academic functioning and behavior (Tr. pp. 114-16). I find that because the CSE meeting conducted on March 2012 was an annual review, rather than an initial evaluation, and the CSE adequately assessed the student in all of her areas of need, the lack of a classroom observation, in this instance, did not result in a failure to offer the student a FAPE.

The parent further asserts that the district failed to conduct a PT evaluation or recommend PT as a related service. According to the district special education teacher who attended the March 2012 CSE meeting, the parent requested a PT evaluation at the CSE meeting based on the student's awkward gait (Tr. pp. 45-46). The special education teacher testified that in response to the parent's request, the district informed the parent she must write a letter requesting a PT evaluation and obtain a prescription for PT services (id.). According to the special education teacher, the district required a prescription for PT and the parent did not provide the district with a prescription (Tr. pp. 46, 62).

According to the parent, she requested a PT evaluation from the district and the district informed her that she needed to obtain a prescription for PT (Tr. p. 210). The parent testified that she asked for a PT evaluation to be conducted at the March 2012 CSE meeting and had previously provided a prescription for PT to the district (Tr. p. 210-13). The parent testified that the district stated it had no record of receiving a prescription for PT and the student's file was too large to review to check for a PT prescription (Tr. pp. 210-11). The parent, after the CSE meeting, proceeded to check her files and informed the district she had a photocopy of the PT prescription previously provided to the district (Tr. p. 211). The parent testified that the district

record" to the Office of State Review (8 NYCRR 279.9[a]).

eventually found the prescription but at that time the then-current school year was over (*id.*). Additionally, the parent stated the student's IEP previously provided for PT (Tr. p. 210).

The parent stated the student required PT due to the student's orthopedic needs including low muscle tone, weakness in her hands and legs, difficulty with balance, an awkward gait, stiff calf muscles, and in addition the student used to wear braces on both legs (Tr. pp. 211-12). The March 2012 IEP noted the student presented with overall low muscle tone but indicated it was within normal limits (Parent Ex. E at p. 2). The IEP also noted that the student had muscle tightness in her ankles and decreased arches in her feet because of abnormal walking patterns and further noted that orthotics were provide to improve her walking (*id.*).¹⁰ The IEP indicated that the student was provided with a stretching program to improve muscle tone and flexibility that included stretching twice daily; the parent was also taught methods of stretching for use at home (*id.*). The parent testified the student had yet to receive a PT evaluation at the time of the impartial hearing (Tr. p. 212). I find the hearing record supports that a PT evaluation was necessary to fully assess the student's needs and to determine whether she required PT services. Accordingly, I will order the district to conduct a PT evaluation of the student as set forth below.

A review of the hearing record shows that although the CSE did not obtain a classroom observation or a PT evaluation, the evaluative information before the March 2012 CSE, as well as input from CSE members, provided information related to the student's functioning in academics, cognition, ADLs, language, sensory regulation, motor skills, and social/emotional/behavioral skills. However, I need not make a determination on the question of whether the deficiencies in the evaluative information available to the March 2012 CSE, by itself, constituted a denial of FAPE to the student because, as set forth in detail below, the IEP failed to offer the student a FAPE for additional reasons.

2. Special Factors – Interfering Behaviors

In addition to the parent's challenge to the sufficiency of the data available to the March 2012 CSE as described above, the parent also contends that the design of the program set forth in the resulting IEP was not supported by the available evaluative information (see J.C.S. v. Blind Brook-Rye Union Free Sch. Dist., 2013 WL 3975942, at *9-*10 [S.D.N.Y. Aug. 5, 2013] [noting the distinction between claims of whether a CSE has adequate information to develop an IEP and whether the CSE gave due consideration to the available information]). In developing an IEP, a CSE is directed to "review existing evaluation data on the child, including—(i) evaluations and information provided by the parents of the child; (ii) current classroom-based, local, or State assessments, and classroom based observations; and (iii) observations by teachers and related services providers" (20 U.S.C. § 1414[c][1][A]). Further, in developing the recommendations for a student's IEP, the CSE must consider the results of the "initial or most recent evaluation; the student's strengths; the concerns of the parents for enhancing the education of their child; the academic, developmental[,] and functional needs of the student, including, as appropriate, the results of the student's performance on any general State or district-wide assessments; and any special considerations" in federal and State regulations (20 U.S.C. § 1414[d][3][A], [B]; 34 CFR 300.324[a]; 8 NYCRR 200.4[d][2]; see also T.G. v. New York City Dep't of Educ., 2013 WL

¹⁰ The parent testified that the student lost her orthotics and the parent was unable to afford new ones at the time of the impartial hearing (Tr. p. 212).

5178300, at *18 [S.D.N.Y. Sept. 16, 2013]; E.A.M. v. New York City Dep't of Educ., 2012 WL 4571794, at *9 [S.D.N.Y. Sept. 29, 2012]).

The parent asserts that the March 2012 CSE failed to consider the information provided to the CSE by the student's teacher and the reports from Imagine to set forth accurate present levels of performance. Although the CSE reviewed multiple evaluations, necessary information provided to the CSE regarding the student's interfering behavior by the Imagine classroom teacher, principal, and occupational therapist, as well as in the evaluative reports before the CSE, was not reflected in the present levels of performance contained in the March 2012 IEP, or the IEP as a whole.

The evaluative reports before the CSE provided information regarding the student's abilities and needs in academics, language, communication, sensory regulation, social/emotional and behavioral functioning, and ADL skills (see Dist. Ex. 9; Parent Ex. K). The March 2012 CSE developed the student's present levels of performance based upon the evaluative information and input from the CSE members including the student's then-current teacher (compare Parent Ex. E, with Dist. Ex. 8; 9). The March 2012 IEP set forth information regarding the student's academics, cognition, ADL skills, and language within the IEP as a whole; however, the student's needs related to interfering behaviors were not reflected in the IEP.

Imagine's principal testified that the classroom teacher provided the March 2012 CSE with information regarding the student's behavior and described the student's program at Imagine that included behavioral strategies and supports (Tr. p. 116-17; Dist. Ex. 7). As set forth in greater detail below, despite the March 2012 CSE's review of the evaluative information and CSE member input that documented the student's behaviors, the IEP as a whole failed to adequately identify the student's behavior and did not include a description of the student's behaviors in the present levels of performance.

The parent asserts that the IHO erred in determining that the student's behaviors did not warrant the inclusion of strategies in the March 2012 IEP and in deciding that the CSE permissibly determined that the student did not require a BIP. The hearing record as a whole shows that the evaluative information available to the March 2012 CSE reflected that the student demonstrated behavioral needs and the IEP failed to reflect the student's behavioral needs in the present levels of performance description or in the IEP as a whole. In addition, as set forth below, the sum of the evaluative information before the CSE revealed that the student's behavior impeded her learning.

Under the IDEA, a CSE may be required to consider special factors in the development of a student's IEP. Among the special factors in the case of a student whose behavior impedes his or her learning or that of others, the CSE shall consider positive behavioral interventions and supports, and other strategies, to address that behavior (20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; see 8 NYCRR 200.4[d][3][i]; see also E.H. v. Bd. of Educ., 361 Fed. App'x 156, 160-61, 2009 WL 3326627 [2d Cir. Oct. 16, 2009]; A.C., 553 F.3d at 172; J.A. v. East Ramapo Cent. Sch. Dist., 603 F. Supp. 2d 684, 689 [S.D.N.Y. 2009]; M.M. v. New York City Dep't of Educ., 583 F. Supp. 2d 498, 510 [S.D.N.Y. 2008]; Tarlowe, 2008 WL 2736027, at *8; W.S. v. Rye City Sch. Dist., 454 F. Supp. 2d 134, 149-50 [S.D.N.Y. 2006]). To the extent

necessary to offer a student an appropriate educational program, an IEP must identify the supplementary aids and services to be provided to the student (20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v][a], [b][3]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 673 [S.D.N.Y. 2011]; Gavriety v. New Lebanon Cent. Sch. Dist., 2009 WL 3164435, at *30 [N.D.N.Y. Sept. 29, 2009] [discussing the student's IEP which appropriately identified program modifications, accommodations, and supplementary aids and services]; P.K. v. Bedford Cent. Sch. Dist., 569 F. Supp. 2d 371, 380 [2008]).

In New York State, policy guidance explains that "the IEP must include a statement (under the applicable sections of the IEP) if the student needs a particular device or service (including an intervention, accommodation or other program modification) to address," among other things, a student's interfering behaviors, "in order for the student to receive a [FAPE]" ("Guide to Quality Individualized Education Program [IEP] Development and Implementation," Office of Special Educ. [Dec. 2010], at p. 22, available at <http://www.p12.nysed.gov/specialed/publications/iepguidance/IEPguideDec2010.pdf>). "The behavioral interventions and/or supports should be indicated under the applicable section of the IEP," and if necessary, "a "student's need for a [BIP] must be documented in the IEP" (*id.*). State procedures for considering the special factor of a student's behavior that impedes his or her learning or that of others may also require that the CSE consider having an FBA conducted and a BIP developed for a student (8 NYCRR 200.4[d][3][i], 200.22[a], [b]). An FBA is defined in State regulations as "the process of determining why a student engages in behaviors that impede learning and how the student's behavior relates to the environment" and "include[s], but is not limited to, the identification of the problem behavior, the definition of the behavior in concrete terms, the identification of the contextual factors that contribute to the behavior (including cognitive and affective factors) and the formulation of a hypothesis regarding the general conditions under which a behavior usually occurs and probable consequences that serve to maintain it" (8 NYCRR 200.1[r]). According to State regulations, an FBA shall be based on multiple sources of data and must be based on more than the student's history of presenting problem behaviors (8 NYCRR 200.22[a][2]). An FBA must also include a baseline setting forth the "frequency, duration, intensity and/or latency across activities, settings, people and times of the day," so that a BIP (if required) may be developed "that addresses antecedent behaviors, reinforcing consequences of the behavior, recommendations for teaching alternative skills or behaviors and an assessment of student preferences for reinforcement" (8 NYCRR 200.22[a][3]).

Although state regulations call for the procedure of using an FBA when developing a BIP, the Second Circuit has explained that, when required, "[t]he failure to conduct an adequate FBA is a serious procedural violation because it may prevent the CSE from obtaining necessary information about the student's behaviors, leading to their being addressed in the IEP inadequately or not at all" (R.E., 694 F3d at 190). However, the Court also noted that "[t]he failure to conduct an FBA will not always rise to the level of a denial of a FAPE," but that in such instances particular care must be taken to determine whether the IEP addresses the student's problem behaviors (*id.*).

It is undisputed that the district did not conduct an FBA in this case. However, the March 2012 CSE considered the February 2012 psychoeducational evaluation, March 2012 Imagine

Academy annual review report, and input from the principal of Imagine and the student's teacher and occupational therapist from Imagine (Dist. Exs. 1 at p. 2; 9; Parent Ex. K).

The February 2012 psychoeducational evaluation conducted by the district school psychologist indicated that the student's behavior impeded her learning (Dist. Ex. 9). Specifically, the school psychologist was unable to administer the SB-V due to the student's behaviors, which included the student leaving her seat as well as a failure to follow directions and respond to questions (id. at p. 2). The school psychologist reported the student engaged in hyperactive behaviors such as being in "constant motion," as well as looking and acting visibly upset, and required "constant[]" redirection (id.). According to the school psychologist, during a 2010 evaluation of the student, the student engaged in self-stimulatory behaviors including hand flapping, rolling her head back and forth, and vocalizing (id. at p. 1).

As discussed above, the March 2012 Imagine annual review report also indicated that the student engaged in behaviors that impeded her learning, including crying, scratching herself and others, and rocking her body (Parent Ex. K at p. 1). The report indicated the teacher needed to provide "maximum assistance" to the student to assist the student with self-regulation (id.). The teacher reported that the student required a daily sensory diet that included the provision of proprioceptive and vestibular input (id. at p. 6). Within a group setting, with 1:1 supervision, the student continued to require assistance to maintain attention to a task, follow directions, and take turns (id. at p. 1).

A district special education teacher, who also served as the district representative, a district school psychologist, and the parent as well as the student's classroom teacher, occupational therapist, and principal from Imagine were the participants at the March 2012 CSE meeting (Tr. p. 114; Dist. Ex. 10 at p. 1; Parent Ex. E at pp. 11-12). The principal from Imagine testified that the student's classroom teacher provided the March 2012 CSE with information regarding the student's behavior (Tr. p. 116). The principal further testified that she and the teacher explained to the March 2012 CSE that the student's behaviors were extensive and as a result the student required 1:1 instruction (Tr. pp. 116, 118). According to the testimony of the principal, the teacher and principal provided a description of the student's program at Imagine to the CSE (Tr. p. 117), which included numerous behavioral interventions to address the student's needs related to behavior (see Parent Ex. K).

The March 2012 CSE determined the student did not require strategies or supports to address her behavioral needs, and that the student did not require a BIP (Parent Ex. E at p. 2). The district special education teacher at the March 2012 CSE meeting testified he did not recall whether the CSE discussed the need to conduct an FBA or develop a BIP for the student (Tr. p. 54). The minutes of the CSE meeting indicated that the CSE would develop a BIP for the student but, upon further review, the CSE believed a formal BIP was unnecessary (Dist. Ex. 10 at p. 2).¹¹ Although the IEP indicated the student "shows overall calmer behaviors" and an improved ability to calm herself, the balance of the evaluative information indicates the student continued to exhibit interfering behaviors which were not indicated on the IEP (compare Parent Ex. E at p. 1, with Parent Ex. K at p. 1). Although the evaluative information before the March 2012 CSE indicated the student engaged in maladaptive behaviors including tantrums, hand

¹¹ The district reportedly developed a BIP for the student the prior school year (2011-12) (Parent Ex. A at p. 3).

flapping, crying, scratching herself and others, rocking, and difficulty with attention and hyperactivity, the March 2012 CSE, according to the minutes of CSE meeting, determined a BIP was unnecessary without stating an explanation.

A review of the IEP reveals the March 2012 CSE did not describe the student's behaviors that impeded her learning including her tantrums, scratching herself and others, impulsivity, hyperactivity, crying, rocking her body, hand flapping, and overall difficulties with attention and self-regulation. Despite the March 2012 CSE's review of the evaluative information and CSE member input that documented the student's behaviors, the CSE failed to adequately identify the student's behaviors in the IEP. Although the student's Imagine classroom teacher indicated the student's interfering behaviors occurred consistently throughout the day and required interventions, the district did not conduct an FBA or develop a BIP for the student for the 2012-13 school year (Parent Ex. K at pp. 1-2). In addition, under the circumstances of this case, the CSE should have conducted an FBA to determine the factors related to the student's interfering behaviors and erred by concluding the student's behavior did not seriously interfere with instruction.

Notwithstanding all of the foregoing, the absence of an FBA and a BIP does not necessarily result in a failure to offer a FAPE if the student's IEP otherwise addresses the interfering behaviors based upon the information available to the CSE (R.E., 694 F.3d at 190-91). In this case, in addition to failing to identify the student's maladaptive behaviors, the March 2012 IEP also failed to prescribe ways to manage the behaviors. The parent correctly asserts that the IEP lacked modifications to the student's environment or supports to address the student's interfering behaviors. The management needs section of the IEP did not include any strategies or supports related to the student's behavior, only strategies to address the student's low muscle tone (Parent Ex. E at p. 2). The district special education teacher who attended the March 2012 CSE meeting testified that he believed the student required academic management needs such as redirection and visual schedules, but he also testified that the CSE did not include those management needs in the IEP (Tr. pp. 47-48). Similarly, he testified that despite discussion of the interventions used by Imagine staff to manage the student's behaviors, none were included on the student's IEP (Tr. pp. 52-53). Accordingly, the balance of the evidence in the hearing record shows that the student's interfering behaviors, as identified in the evaluative information available to the March 2012 CSE, warranted that behavioral supports and interventions be included in the March 2012 IEP.

The March 2012 IEP also contained several indistinct statements regarding strategies to address the student's needs, but upon examination, these statements did not recommend the provision of services and strategies that would actually address the student's behaviors. For example, the IEP reflected that the parent "would like her daughter to continue to receive consistent, predictable and highly structured schedule" to improve her academic skills, daily living skills, and social/emotional development (Parent Ex. E at p. 1). Thus, the IEP was written to indicate what the parent "would like" rather than identifying and providing the student with a method of addressing the student's behavior. In addition, although the IEP indicated that "[w]ith adequate daily and constant supervision, [the student was] able to participate in school activities throughout the day," the IEP did not contain supports and strategies that would provide the student with this amount of supervision (id. at p. 2).

The district contends that the March 2012 CSE was aware of the student's behavioral needs and therefore recommended strategies to address them within certain annual goals, including visual and verbal prompts, and multisensory instruction. The student's annual goals and short-term objectives call for the use of visuals, manipulatives, repetition, modeling and direct instruction to address the student's needs related to math, reading, and attention (Parent Ex. E at pp. 3-4). The strategies offered within the annual goals and short-term objectives were goal-specific and related to mainly academic needs, rather than constituting a plan to address the student's interfering behaviors. Aside for one short-term objective related to attention skills, the March 2012 CSE did not address the student's behavior by way of the annual goals and short-term objectives (see id. at pp. 3-5). Additionally, although the March 2012 CSE recommended three times weekly OT for the student (id. at p. 6), which might assist the student with behaviors related to self-regulation, the district has not shown, based on the information known to the CSE at the time of the meeting, that this service would provide a sufficient amount of support to enable the student to maintain self-regulation and avoid interfering behaviors throughout the school day.

In sum, the hearing record shows that the March 2012 IEP did not adequately identify or address the student's interfering behaviors. As stated above, the March 2012 CSE determined the student did not require strategies or supports to address her behavioral needs, and that the student did not require a BIP (Parent Ex. E at p. 2). The limited and vaguely described supports offered in the IEP were inadequate to address the student's interfering behaviors. I find the CSE's failure to comply with State regulation and conduct a FBA and BIP deprived the student of educational benefits, as the CSE failed to consider the special factors related to the student's behavior concerns that impeded her learning (see 20 U.S.C. § 1414[d][3][B][i]; 34 CFR 300.324[a][2][i]; 8 NYCRR 200.4[d][3][i]). Accordingly, the hearing record supports a finding that the district failed to offer the student a FAPE during the 2012-13 school year by failing to sufficiently address her interfering behaviors.

3. Adequacy of Annual Goals and Short-Term Objectives

The parent contends that the IHO erred in finding that the IEP goals were a sufficient guide to the areas that needed to be addressed for the student, because some of the short-term objectives did not relate to the corresponding annual goals, the goals were written for a 1:1 setting and were not modified to be implemented in the recommended 6:1+1 setting, and additional goals were needed to address the student's needs in math, reading, writing, gross motor and OT. An IEP must include a written statement of measurable annual goals, including academic and functional goals designed to meet the student's needs that result from the student's disability to enable the student to be involved in and make progress in the general education curriculum; and meet each of the student's other educational needs that result from the student's disability (see 20 U.S.C. § 1414[d][1][A][i][II]; 34 CFR 300.320[a][2][i]; 8 NYCRR 200.4[d][2][iii]). Each annual goal shall include the evaluative criteria, evaluation procedures and schedules to be used to measure progress toward meeting the annual goal during the period beginning with placement and ending with the next scheduled review by the committee (8 NYCRR 200.4[d][2][iii][b]; see 20 U.S.C. § 1414[d][1][A][i][III]; 34 CFR 300.320[a][3]).

A review of the March 2012 IEP shows that the CSE developed six annual goals and eight short-term objectives (Parent Ex. E at pp. 3-5). With respect to three of the annual goals, the short-term objectives did not align with the corresponding annual goal (*id.*). In addition, as noted above, the annual goals and short-term objectives did not alleviate the failure to otherwise address the student's needs relating to her behaviors (*id.*).

The lack of alignment of the annual goals to the short-term objectives is demonstrated by review of three annual goals related to math, motor/ADL skills, and feeding found in the IEP (Parent Ex. E at pp. 3-5). The math goal provides that, "using various manipulative materials and visual support, [the student] will understand numerical concepts (more/less/equal) with 90% accuracy with moderate assistance" (*id.* at p. 3). The corresponding short-term objective; however, does not relate to math or target a math skill related to numerical concepts; rather, it related to maintaining attention during an interaction while in a dyad with a peer (*id.*). The district special education teacher who attended the March 2012 CSE meeting testified that upon reviewing the annual goal related to math, he was "confused" as to how the short-term objective was intended to relate to the annual goal (Tr. p. 57). The second goal indicated that the student would "improve her fine motor skills by following techniques implemented by her [o]ccupational therapist" (Parent Ex. E at p. 5). The annual goal contained two corresponding short-term objectives related to showering and toileting (*id.*). Once again, although showering and toileting may involve discrete steps that encompass areas relating to fine motor skills, the March 2012 CSE did not directly align the short-term objectives with the annual goal by specifying particular tasks associated with showering and toileting that addressed the student's identified fine motor needs, such as manipulation of buttons and zippers (Parent Ex. K at p. 6). The third annual goal indicated the student would improve oral motor/articulation skills and feeding abilities (Parent Ex. E at pp. 4-5). The annual goal contained two short-term objectives, one of which related to answering "wh" questions (*id.*). Although the district special education teacher testified that answering "wh" questions addressed the student's oral motor and articulation needs because "'Wh' is a difficult thing to articulate," this objective does not have a direct correlation with the student's oral motor abilities or articulation skills as it targets the answering of questions rather than correct articulation.

As shown in the three examples above, the short-term instructional objectives did not consist of intermediate steps necessary to accomplish the annual goals. However, the skills targeted by the short-term objectives addressed identified needs of the student and were drawn primarily from Imagine reports (*see* Parent Ex. K at pp. 2-3, 5). Accordingly, the failure of the annual goals to correspond precisely with the short-term objectives does not in itself deny the student a FAPE. Nonetheless, the manner in which the goals and short-term objectives are constructed is such that a teacher attempting to implement the goal would be left with insufficient guidance as to what skill the teacher should measure to indicate the student's progress toward meeting her annual goals.

In review of the annual goals and short-term objectives in the March 2012 IEP, with the exception of one short-term objective relating to maintaining attention in a dyad, the goals did not address the student's needs related to sensory regulation and behavior (*see* Parent Ex. E at pp. 3-5). Accordingly, as noted above, the evaluative reports identified significant behavioral and

sensory related needs but the CSE did not remediate the deficiencies in the IEP by developing goals and objectives to target these needs.¹²

Regarding the parent's assertion that the annual goals could not be implemented within a 6:1+1 special class setting, a review of the hearing record reveals that the annual goals and short-term objectives could have been implemented within a 6:1+1 special class. Moreover, in review of the goals and objectives, there is no evidence to support that 1:1 instruction was required to implement the annual goals and short-term objectives.

In sum, the annual goals and short-term objectives were misaligned and the March 2012 CSE failed to otherwise address to address the student's needs relating to sensory regulation and behavior in the IEP. These deficiencies contributed to the denial of a FAPE under the circumstances of this case.

4. 6:1+1 Special Class Placement

The parent asserts that the recommended 6:1+1 special class placement was not appropriate because the student required 1:1 instruction and that the March 2012 CSE failed to recommend a 1:1 paraprofessional to address her needs within the classroom setting. The district asserts that the 6:1+1 special class was appropriate because it would provide the "high degree of individualized attention" the student required.

The evaluative information before the March 2012 CSE reflected that the student demonstrated interfering behaviors and related deficits in sensory regulation and social/emotional functioning as well as delays in the areas of cognition, academics, language, and ADL skills (Dist. Ex. 9; Parent Ex. K). Specifically, the hearing record reflects, the student demonstrated "significant cognitive delays," well below average academic and language skills, as well as significantly low ADL skills compared to same age peers (Dist. Exs. 1; 9; Parent Exs. E; K). Further, the student's language skills were severely delayed, to the extent that the minutes of the CSE meeting indicated the student had an "inability to communicate her needs" (Dist. Ex. 10 at p. 1).

The evaluative information before the March 2012 CSE indicated that the student required additional supports beyond what the CSE recommended for the student. Once again, as set forth in detail above, the student demonstrated significant needs as shown in a 2012 psychoeducational evaluation, reviewed by the March 2012 CSE, which indicated the school psychologist could not assess the student using a standardized measure due to her behavior (Dist. Ex. 9 at pp. 1-2). In addition, the psychoeducational report indicated the student was largely nonverbal, was in constant motion, responded only with verbal and physical prompts, and had significantly below average abilities in communication, ADL, socialization, and motor skills (id.

¹² Had the district identified the student's sensory needs and interfering behaviors on the IEP and then followed the State procedures for conducting an FBA and developing a BIP, I decline to specifically determine whether annual goals to address these same issues would have also been required in order for the district's programing to pass muster under the Rowley standard. It suffices to say that under the circumstances of this case that the lack of annual goals address these needs does nothing to remediate the failure of the district to identify these needs on the IEP and otherwise address them in some reasonable manner.

at p. 1). While the district was aware of the student's significant global delays, including deficits in behavior as well as academics, the CSE failed to recommend any additional supports or strategies to address the student's needs within a 6:1+1 special class (see Parent Ex. E).

Testimony of the Imagine personnel and the 2012 Imagine annual review report reviewed by the March 2012 CSE also support the finding that a 6:1+1 special class setting was insufficient to address the student's academic and social/emotional/behavioral needs without the provision of a 1:1 paraprofessional or positive behavioral strategies and supports. For example, Imagine's principal testified that the Imagine teacher provided the March 2012 CSE with information regarding the student's academic needs and behaviors at Imagine (Tr. p. 116). The principal and the Imagine director of curriculum (the director) testified that the student's academic and social/emotional and behavioral needs included significant difficulties with self-regulation, communication, transitions, and generalizing skills, as well as behaviors including yelling, scratching herself and others, rocking her body, and crying (Tr. pp. 110, 144-46, 161). According to the testimony of the principal, the teacher and principal provided a description of the student's program at Imagine to the CSE (Tr. pp. 116-18), which included numerous behavioral interventions to address the student's needs related to behavior (see Parent Ex. K).

The Imagine principal testified that Imagine staff informed the March 2012 CSE that the student required 1:1 assistance to learn (Tr. p. 116). The student's teacher also indicated, in her March 2012 report reviewed by the March 2012 CSE, the student required direct 1:1 instruction with trained professionals for the student to acquire and develop new skills (Parent Ex. K at p. 9). In addition, the principal testified that the teacher and she explained to the March 2012 CSE that the student's behaviors were so extensive the student required 1:1 instruction (Tr. pp. 116, 118). The March 2012 report also informed the CSE regarding the successful strategies and supports that Imagine implemented to address the student's behaviors, including a 1:1 support, a visual schedule, verbal prompts, positive reinforcement, and a sensory diet including proprioceptive and vestibular input, deep pressure, and joint compressions (Tr. pp. 146-48; Parent Ex. K). Despite documentation and CSE member input, the March 2012 CSE failed to recommend supports such as a paraprofessional or positive behavioral interventions together with the recommended 6:1+1 special class to address the student's needs.

Imagine's principal and director testified that the student required 1:1 support including a sensory diet to progress due to her needs in the areas of attention, task completion, self-stimulatory behavior, distracting others, self-regulation, and social/emotional functioning (Tr. pp. 110, 112, 146-47, 169-70). The district special education teacher who attended the March 2012 CSE meeting testified that the CSE determined a 1:1 program for the student was too restrictive but did not recall whether the district considered provision of a 1:1 paraprofessional (Tr. pp. 50, 55). However to the contrary, the March 2012 IEP indicated the CSE rejected a 12:1+1 special class in a community school due to the student's significant cognitive delays but did not note that there was consideration of a 1:1 paraprofessional or any other program options for the student (Parent Ex. E at p. 9).

The district asserts that the student did not require full time 1:1 instruction and that the CSE was "cognizant" of the student's deficits and therefore recommended 1:1 instruction and various strategies within the annual goals including visual and verbal prompts, and multisensory

instruction. However, the IEP did not make any provision for the student to receive 1:1 direct instruction, only that the student's teacher believed the student required such instruction (see Parent Ex. E at p. 1). Further, in review of the March 2012 IEP, the IEP did not indicate that the student was to receive 1:1 instruction anywhere in the IEP (see id.). As far as the strategies and techniques of visual support, modeling, and use of manipulatives, these strategies were embedded within annual goals and short-term objectives and were specific to instruction regarding academic skills (id. at pp. 3-4). Accordingly, these strategies—as written into the IEP— were not designed to adequately address the student's behavioral needs.¹³

Although a 6:1+1 special class might offer individual attention and been an appropriate setting , it appears from that record that, without additional supports, it would not provide such attention to the extent required by the student because of her academic, behavioral, and related needs, especially given that the IEP lacked the provision of a 1:1 paraprofessional or other positive behavioral strategies and supports. Under these specific circumstances, the recommended 6:1+1 special class placement, without more, was not appropriate to address the student's academic, social/emotional, and behavioral needs given the failure of the March 2012 CSE to include positive behavioral supports or a 1:1 paraprofessional for the student. However, the hearing record does not support a finding that a 6:1+1 special class with appropriate supports was categorically inappropriate to address the student's needs had proper supportive services been added to the IEP.

5. Educational Methodology

The parent asserts that the CSE failed to identify the use of instruction using an ABA methodology in the student's March 2012 IEP; however, there is insufficient evidence in the hearing record to show that ABA was the only program capable of offering the student educational benefit. Generally, a CSE is not required to specify methodology on an IEP, and the precise teaching methodology to be used by a student's teacher is usually a matter to be left to the discretion of the teacher (Rowley, 458 U.S. at 208; M.M. v. Sch. Bd., 437 F.3d 1085, 1102 [11th Cir. 2006]; Lachman v. Illinois State Bd. of Educ., 852 F.2d 290, 297 [7th Cir. 1988]; A.S. v New York City Dep't of Educ., 10-cv-00009 [E.D.N.Y. May 26, 2011] [noting the "broad methodological latitude" conferred by the IDEA]; Application of a Student with a Disability, Appeal No. 12-045; see K.L. v New York City Dep't of Educ., 2012 WL 4017822, at *12 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81, 2013 WL 3814669 [2d Cir. July 24, 2013] [noting that it is "well established that once an IEP satisfies the requirements of the [IDEA], questions of educational methodology may be left to the state to resolve"]; Straube v. Florida Union Free Sch. Dist., 801 F. Supp. 1164, 1176 [S.D.N.Y.1992]).

The student's March 2012 IEP did not limit instruction to one specific instructional methodology (see Parent Ex. E). As noted above, the March 2012 CSE reviewed evaluative documents regarding the student, none of which recommended instruction using an ABA methodology for the student (see Dist. Ex. 9; Parent Ex. K). Moreover, the March 2012 Imagine report recommended direct 1:1 instruction with trained professionals for the student to develop

¹³ The short-term objective regarding the student maintaining attention while participating in a dyad specifies the provision of "visual support" (Parent Ex. E at p. 3). For the reasons stated above, this is insufficient to address the student's significant needs relating to behavior.

and acquire new skills, but did not specifically recommend an ABA methodology (Parent Ex. K at p. 9).

Imagine's principal testified that the March 2012 CSE was aware that Imagine implemented an ABA program with the student (Tr. p. 117). The teachers at Imagine implemented strategies and supports including a sensory diet, visual cues, and positive reinforcement (Tr. pp. 146-47; Dist. Ex. 7 at pp. 1-6). Nonetheless, according to the testimony of the principal, teachers at Imagine did not rely solely on ABA but also implemented other methodologies commonly used in the instruction of students with autism, including the Treatment and Education of Autistic and Related Communication Handicapped Children (TEACCH) and Developmental, Individual-difference, Relationship-based (DIR) models (Tr. pp. 92-94, 97-99; see Parent Ex. K at p. 1). According to the curriculum director, the student performed well within a 1:1 ABA setting (Tr. p. 150-51). However, the evaluators who completed the evaluative reports considered by the CSE did not recommend a program utilizing instruction with an ABA methodology exclusively for the student (Dist. Ex. 9; Parent Ex. K). Based on the foregoing, I do not find support in the hearing record for finding that the student required instruction exclusively using an ABA methodology in order to receive educational benefits.

6. Parent Counseling and Training

Turning next to the parties' claims regarding whether the omission of parent counseling and training as a related service from the March 2012 IEP resulted in a denial of a FAPE to the student, State regulations require that an IEP indicate the extent to which parent training will be provided to parents, when appropriate (8 NYCRR 200.4[d][2][v][b][5]). State regulations further provide for the provision of parent counseling and training for the purpose of enabling parents of students with autism to perform appropriate follow-up intervention activities at home (8 NYCRR 200.13[d]). Parent counseling and training is defined as: "assisting parents in understanding the special needs of their child; providing parents with information about child development; and helping parents to acquire the necessary skills that will allow them to support the implementation of their child's individualized education program" (8 NYCRR 200.1[kk]; see 34 CFR 300.34[c][8]). However, Courts have held that a failure to include parent counseling and training on an IEP does not constitute a denial of a FAPE where a district provided "comprehensive parent training component" that satisfied the requirements of the State regulation (see R.E., 694 F.3d at 191; M.M., 583 F. Supp. 2d at 509). The Second Circuit has explained that "because school districts are required by [8 NYCRR] 200.13(d) to provide parent counseling, they remain accountable for their failure to do so no matter the contents of the IEP. Parents can file a complaint at any time if they feel they are not receiving this service" (R.E., 694 F.3d at 191; see M.W. v. New York City Dep't of Educ., 725 F.3d 131, 141-42 [2d Cir. 2013]). The Second Circuit further explained that "[t]hrough the failure to include parent counseling in the IEP may, in some cases (particularly when aggregated with other violations), result in a denial of a FAPE, in the ordinary case that failure, standing alone, is not sufficient to warrant reimbursement" (R.E., 694 F.3d at 191).

The hearing record reflects that the IEP did not include a provision for parent counseling and training and the district special education teacher did not recall a discussion of parent

counseling and training at the March 2012 CSE meeting (Tr. p. 124: see Parent Ex. E). The district was required to comply with State regulations by identifying parent counseling and training on the student's March 2012 IEP (8 NYCRR 200.4[d][2][v][b][5]). However, there is no indication in the hearing record that the failure to place parent counseling and training on the IEP resulted in a denial of a FAPE. The hearing record does not indicate that the parent had significant need for parent counseling and training at the time of the CSE meeting. The parent testified that she had engaged in trainings in ABA and DIR and generalizing the Imagine program into the home for herself and home-based service providers (Tr. pp. 206-08, 220-21). The parent further indicated that she continued to attend trainings session and special events at Imagine and observed the student's classroom (Tr. pp. 231-32).

Based upon the foregoing, I find that although the March 2012 CSE's failure to recommend parent counseling and training in the student's IEP constituted a violation of State regulation, such a violation alone will not independently support a finding that the district failed to offer the student a FAPE (see R.E., 694 F.3d at 191; F.L. v. New York City Dep't of Educ., 2012 WL 4891748, at *9-*10 [S.D.N.Y. Oct. 16, 2012]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *10 [S.D.N.Y. Oct. 28, 2011]; M.N. v. New York City Dep't of Educ., 700 F. Supp. 2d 356, 368 [S.D.N.Y. 2010]; see also M.W., 725 F.3d at 141-42).

To be clear, however, the fact that the district failed to include parent counseling and training on the student's IEP remains a procedural violation, and compliance with State procedures is nevertheless mandated, and in light of the other deficiencies identified previously, the violation in this instance only further contributed to the district's failure to offer the student a FAPE. In light of the district's failure in this case to identify parent counseling and training on the student's IEP as required by the IDEA and State regulations, I will order that when the next CSE reconvenes, the district shall consider whether the related service of parent counseling and training is required to enable the student to benefit from instruction and, after due consideration, provide the parents with prior written notice on the form prescribed by the Commissioner that, among other things, specifically describes whether the CSE recommended or refused to recommend parent counseling and training on the student's IEP together with an explanation of the basis for the CSE's recommendation in conformity with the procedural safeguards of the IDEA and State regulations (34 CFR 300.503[a], [b]; 8 NYCRR 200.1[oo]; 200.5[a]).

C. Challenges to the Public School Site

The parent brings several challenges to the assigned school site, alleging that the student's IEP would not be properly implemented at the assigned school because the student would not be properly grouped with students of similar needs and ability, because the school could not provide 1:1 ABA services, and because the school site would be unsafe for the student in light of her food allergies. However, the district argues that any inquiry into the appropriateness of the assigned public school site is speculative because the parent unilaterally enrolled the student at Imagine prior to the beginning of the 2012-13 school year.

Initially, challenges to an assigned school are generally relevant to whether the district properly implemented a student's IEP, which is speculative when the student never attended the recommended placement. Generally, the sufficiency of the district's offered program must be

determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has explained that the parents' "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see F.L., 2012 WL 4891748, at *14-*16; Ganje v. Depew Union Free Sch. Dist., 2012 WL 5473491, at *15 [W.D.N.Y. Sept. 26, 2012] [finding the parents' pre-implementation arguments that the district would fail to adhere to the IEP were speculative and therefore misplaced], adopted at 2012 WL 5473485 [W.D.N.Y. Nov. 9, 2012]; see also K.L. v. New York City Dep't of Educ., 530 Fed. App'x 81, 85-86, 2013 WL 3814669 [2d Cir. July 24, 2013]; Reyes v. New York City Dep't of Educ., 2012 WL 6136493, at *7 [S.D.N.Y. Dec. 11, 2012]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012] [explaining that "[g]iven the Second Circuit's recent pronouncement that a school district may not rely on evidence that a child would have had a specific teacher or specific aide to support an otherwise deficient IEP, it would be inconsistent to require evidence of the actual classroom in which a student would be placed where the parent rejected an IEP before the student's classroom arrangements were even made]; Peter G. v. Chicago Pub. Sch. Dist. No. 299 Bd. of Educ., 2003 WL 121932, at *19 [N.D. Ill. Jan. 13, 2003] [noting that the court would not speculate regarding the success of the student's services where the parent removed student from the public school before the IEP services were implemented]).

While several district courts have, since R.E. was decided, continued to wrestle with this difficult issue regarding challenges to the implementation of an IEP made before the student begins attending the school and taking services under the IEP (see D.C. v. New York City Dep't of Educ., 2013 WL 1234864, at *11-*16 [S.D.N.Y. Mar. 26, 2013] [holding that the district must establish that it can implement the student's IEP at the assigned school at the time the parent is required to determine whether to accept the IEP or unilaterally place the student]; B.R. v. New York City Dep't of Educ., 910 F.Supp.2d 670, 676-78 [S.D.N.Y. 2012] [same]; E.A.M., 2012 WL 4571794, at *11 [holding that parents may prospectively challenge the adequacy of a "placement classroom" when a child has not enrolled in the school because districts are not permitted to assign a child to a public school that cannot satisfy the requirements of an IEP]), I now find it necessary to depart from those cases. Since these prospective implementation cases were decided in the district courts, the Second Circuit has also clarified that, under factual circumstances similar to those in this case, in which the parents have rejected and unilaterally placed the student prior to IEP implementation, "[p]arents are entitled to rely on the IEP for a description of the services that will be provided to their child" (P.K. v. New York City Dep't of Educ., 526 Fed. App'x 135, 141, 2013 WL 2158587 [2d Cir. May 21, 2013]) and, even more clearly, that "[t]he appropriate inquiry is into the nature of the program actually offered in the written plan,' not a retrospective assessment of how that plan would have been executed" (K.L., 530 Fed. App'x at 87, quoting R.E., 694 F.3d at 187 [rejecting as improper claims relating to the public school site]). Thus, the analysis of the adequacy of an IEP in accordance with R.E. is prospective in nature, but the analysis of the IEP's implementation is retrospective. Therefore, if it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).¹⁴

¹⁴ The Second Circuit has also made clear that just because a district is not required to place implementation details such as the particular school site or classroom location on a student's IEP, the district is not permitted to

As explained more recently, "[t]he Second Circuit has been clear, however, that where a parent enrolls the child in a private placement before the time that the district would have been obligated to implement the IEP placement, the validity of proposed placement is to be judged on the face of the IEP, rather than from evidence introduced later concerning how the IEP might have been, or allegedly would have been, implemented" (A.M. v. New York City Dep't of Educ., 2013 WL 4056216, at *13 [S.D.N.Y. Aug. 9, 2013]; see R.B. v. New York City Dep't of Educ., 2013 WL 5438605, at *17 [S.D.N.Y. Sept. 27, 2013]; E.F. v New York City Dept. of Educ., 2013 WL 4495676, at *26 [E.D.N.Y. Aug. 19, 2013]; M.R. v New York City Bd. of Educ., 2013 WL 4834856, at *5 [S.D.N.Y. Aug. 14, 2013] [finding that the argument that the assigned school would not have been able to implement the IEP is "entirely speculative"]; N.K. v. New York City Dep't of Educ., 2013 WL 4436528, at *9 [S.D.N.Y. Aug. 13, 2013]).

In view of the forgoing, the parent cannot prevail on her claims that the district would have failed to implement the March 2012 IEP at the public school site because a retrospective analysis of how the district would have executed the student's March 2012 IEP at the assigned public school site is not an appropriate inquiry under the circumstances of this case (K.L., 530 Fed. App'x at 87; R.E., 694 F.3d at 186-87; R.C., 906 F. Supp. 2d at 273). Here, it is undisputed that the parent rejected the assigned public school site that the student would have attended, and instead chose to enroll the student in a nonpublic school of her choosing (see Tr. pp. 235-38; Parent Exs. C; D; G). Therefore, the district is correct that the issues raised and the arguments asserted by the parent with respect to the assigned public school site are speculative, and, as indicated above, a retrospective analysis of how the district would have executed the student's June 2012 IEP at the assigned public school site is not an appropriate inquiry (see K.L., 530 Fed. App'x at 87).

Even assuming, for the sake of argument, that the student had attended the public school site, upon review of the hearing record, I find no definitive reason to depart from the IHO's findings concerning the proposed implementation of the student's IEP at the assigned school and in light of the discussion above, it is unnecessary offer further alternative findings.

D. The Parent's Unilateral Placement

Given IHO's conclusion that the district offered the student a FAPE, the IHO did not reach the issue of the appropriateness of the parent's unilateral placement at Imagine (IHO Decision at p. 16). The district contends, without elaboration, that the parent has failed to sustain her burden to show that Image was appropriate, while the parent submits a detailed argument asserting that the hearing record contained ample evidence that Imagine was an appropriate placement for the student during the 2012-13 school year.

choose any school and provide services that deviate from the provisions set forth in the IEP (see R.E., 694 F.3d at 191-92; T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 420 [2d Cir. 2009] [district does not have carte blanche to provide services to a child at a school that cannot satisfy the IEP's requirements]). The district has no option but to implement the written IEP and parents are well within their rights to compel a non-compliant district to adhere to the terms of the written plan.

A private school placement must be "proper under the Act" for parents to be entitled to public funding (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), that is, the private school must offer an educational program which meets the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14; see Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000], abrogated on other grounds by Schaffer v. Weast, 546 U.S. 49, 57-58 [2005]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ., 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is only appropriate if it provides education instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Rowley, 458 U.S. at 188-89; Gagliardo, 489 F.3d at 114-15 [noting that even though the unilateral placement provided special education, the evidence did not show that it provided the special education services specifically needed by the student]; Frank G., 459 F.3d at 365; Stevens v. New York City Dep't of Educ., 2010 WL 1005165, *9 [S.D.N.Y. Mar. 18, 2010]).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement:

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child,

supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

The evidence in the hearing record supports the conclusion that Imagine provided the student with instruction specially designed to meet her unique needs during the 2012-13 school year. The principal and director at Imagine both testified that the student demonstrated needs in the areas of academics, sensory regulation, communication, ADL skills, and social/emotional/behavioral functioning (Tr. pp. 110, 144-45). Additionally, the student also demonstrated difficulties with generalizing skills, distractibility, and delayed cognitive skills (Tr. pp. 109-110, 144).

Imagine is a private special education school serving approximately 21 students ages 6 through 19 who have received a diagnosis of autism (Tr. p. 96). Descriptions of the program at Imagine contained in the hearing record indicate that the school groups the 21 students into 4 classrooms and provides 1:1 instruction throughout the day by special educators, related services providers, paraprofessionals, and classroom instructors (Tr. pp. 106-07, 128-29, 131-33). Further, Imagine groups students based on age, developmental level, and social skills with peers (Tr. p. 96).

The principal testified that Imagine implemented ABA techniques throughout the day together with instruction using the TEACCH and DIR methodologies (Tr. pp. 97-98). At Imagine, the teachers, paraprofessionals, classroom instructors, and related services providers rotated working with the student to address the student's difficulties with generalization (Tr. pp. 110-11). To address the student's behaviors, which included yelling, arm flapping, grabbing food from others and out of garbage, scratching, and crying, as well as the student's academic needs, Imagine provided the student with 1:1 instruction and a sensory diet throughout the day (Tr. pp. 110, 160-61). The student's sensory diet included proprioceptive input, access to a sensory gym, use of a brushing technique, as well as jumping and swinging in the sensory gym (Tr. p. 166). Imagine staff were proactive regarding the student's behavior by providing calming sensory activities prior to her behaviors occurring (Tr. pp. 110-11). The staff also altered the student's schedule to bring about changes in her routine to improve her ability to manage transitions (id.).

The Imagine teachers provided the student instruction using individualized programs in reading, math, and ADL skills (Tr. p. 100). Additionally, Imagine provided the student with individual goals and programs related to block design imitation, gender identification, and handwriting (Tr. p. 155; Parent Ex. M). Regarding the student's functional grouping, the student's reading and math skills fell within the middle range of her classmates (Tr. p. 194). The teachers provided the student with discrete trial training, a visual schedule, structure, visual cards for transitions, positive reinforcement, and rewards (Tr. pp. 111, 150-51). The teachers gathered and tracked data to gauge the student's progress and assess the student's ongoing needs (Tr. pp. 100-01). The teachers provided the student instruction using a DIR approach to address the student's needs related to social skills (Tr. p. 98). The teacher reported the student was working on generalizing skills from a 1:1 environment to other settings (Parent Ex. M at p. 4). Imagine provided the student with 1:1 adult supervision at lunch because the student would sometimes

grab food from the garbage can and floor as well as other students, which was a safety concern due to the student's food allergies (Tr. p. 159; but see T.L. v. New York City Dep't of Educ., 938 F. Supp. 2d 417, 435-36 [E.D.N.Y. 2013][expressing some concern regarding environmental factors at specific school locations that may affect the safety of a student]; D.C., 2013 WL 1234864 [finding a particular school inappropriate due to a failure to sufficiently address the student's allergy]; see generally Gagliardo, 489 F.3d at 112, quoting Frank G. 459 F.3d at 364 [explaining that "[s]ubject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'"]).

The hearing record shows that during the 2012-13 year at Imagine, the student received OT, speech-language therapy, expressive therapy, art therapy, and music therapy (Tr. pp. 124, 158; Parent Ex. I). The student received three 45-minute sessions per week of OT to address gross and fine motor skills, visual perceptual skills, sensory modulation, and self-care skills (Parent Ex. M at pp. 4-5). The student engaged in gross motor exercises including obstacle courses, jumping on a trampoline, and walking on a treadmill in order to improve gross motor coordination and motor planning (id. at p. 5). The student had demonstrated improvement in bilateral coordination, writing skills, and self-regulation (id.).

The speech-language pathologist reported the student received two 45-minute sessions per week of speech-language therapy (Parent Ex. M at p. 6). To address the student's language needs, Imagine provided the student with a PECS system (Tr. p. 103). The speech-language therapist worked with the student and staff in implementing a positive reinforcement system to reward the student when she used her PECS in the appropriate manner (Tr. pp. 147-48). The student demonstrated progress regarding her language skills, use of the PECS system, and oral motor feeding (chewing, waiting between swallows) (Parent Ex. M at p. 6). Imagine implemented a feeding protocol with the student to assist the student with her oral motor skills related to feeding (Tr. p. 103). Imagine staff also worked with the student at lunch by helping the student initiate communication and make requests (Tr. pp. 147-48).

The student also received three 40-minute individual expressive therapy sessions and three group sessions weekly (Parent Ex. M at p. 7). To address the student's needs related to social/emotional functioning, the expressive therapist implemented a DIR methodology and expressive therapy techniques (id.). The report indicated the student demonstrated progress regarding her social/emotional therapy goals (id.).

In music therapy, the therapist addressed the student's self-regulation and initiation of social interaction (Parent Ex. K at p. 7). In art therapy, the therapist addressed the student's emotion-related needs including social skills, communication, self-regulation, attention, behavioral organization, and problem solving (id. at p. 8). To address the student social/emotional and behavioral functioning, Imagine also provided the student with yoga and swimming sessions (Tr. pp. 158, 161-166).

Imagine's director testified that the school's staff fostered the student's independence and provided the student the opportunities to complete tasks independently (Tr. p. 149). In addition, although the student received 1:1 instruction all day, much of the instruction occurred within a

group setting with five other students (Tr. pp. 119, 148-49). While at Imagine, the student demonstrated progress with academics, using her PECS, communication skills, ADL skills, following her visual schedule, and her feeding protocol (Tr. pp. 168-69, 179-83). Academically, the student began to read short stories with visual support and improved in writing the letters of her name (Parent Ex. M at p. 4). According to Imagine's director, the student's behavior had improved with the provision of the positive behavioral supports (Tr. p. 161). The student demonstrated progress in that she was able to complete many ADL and vocational tasks including showering, coin rolling, delivering lunch meals, and setting the table (Parent Ex. M at p. 4). Imagine offered two parent-teacher conferences per year and provided progress reports to parents three times per year (Tr. p. 102). Based on the foregoing, I find Imagine was an appropriate placement for the student for the 2012-13 school year.

E. Equitable Considerations and Relief

Initially, I note that the IHO correctly placed the burden of persuasion regarding equitable considerations upon the district, because the burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85; M.P.G., 2010 WL 3398256, at *7). Therefore I dismiss the district's cross appeal as set forth below. The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; M.C. v. Voluntown, 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 362-64 [S.D.N.Y. 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 192 Fed. App'x 62 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at 69 n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

The IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at

public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Here, the district contends that equitable considerations do not favor the parent because the hearing record shows that the parent did not genuinely consider placing the student in public school and had formed the opinion that public school placements were unable to provide the student with appropriate services. However, the hearing record shows that the parent cooperated with the CSE, participated in the CSE meeting along with the staff of the private school, and made the student available for evaluations (Tr. 208, 215-16, 222, 225; Dist. Ex. 9). Further, the parent did not execute a contract with Imagine for the 2012-13 school year until well after the CSE meeting (Parent Ex. G at p. 3). Even were the district correct that the parent bears the burden of establishing that equitable considerations favored her request for relief, it has offered no evidence to rebut any of the foregoing facts and its argument is entirely without foundation in the hearing record.

Therefore, equitable considerations do not bar an award of tuition reimbursement under the circumstances of this case (see C.L. v. New York City Dep't of Educ., 2013 WL 93361, at *8-*9 [S.D.N.Y. Jan. 3, 2013]; B.R., 910 F. Supp. 2d at 679-80; R.K. v. New York City Dep't of Educ., 2011 WL 1131522, at *4 [E.D.N.Y. Mar. 28, 2011]). The parent was under no obligation to "try out" the district's proposed program prior to rejecting the IEP and unilaterally placing the student (R.E. v. New York City Dep't of Educ., 785 F. Supp. 2d 28, 41-42 [S.D.N.Y. 2011], rev'd on other grounds 694 F.3d 167; see Forest Grove, 557 U.S. at 247).

Having determined that Imagine was an appropriate placement for the student for the 2012-13 school year and that equitable considerations do not bar an award of tuition reimbursement, the inquiry in this case does not end there, because the parent requests that the district be required to directly pay to Imagine the costs of the student's tuition, based on her inability to "front" the costs due to a lack of financial resources. For the reasons set forth below, the hearing record does not support this request.

With regard to fashioning equitable relief, one court has addressed whether it is appropriate under the IDEA to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources, have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011]). The court held that "[w]here . . .

parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]). The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which similar claims seeking direct retroactive payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that such financial disputes should be resolved within the administrative hearing process]; see also S.W., 646 F. Supp. 2d at 360). The Mr. and Mrs. A. Court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (Mr. and Mrs. A., 769 F. Supp.2d at 430).¹⁵ Since the parent selected Cooke as the unilateral placement, and her financial status is at issue, I assign to the parent the burden of production and persuasion with respect to whether she has the financial resources to "front" the costs of Cooke and whether she is legally obligated for the student's tuition payments (Application of the Dep't of Educ., 12-132; Application of a Student with a Disability, 12-036; Application of a Student with a Disability, 12-004; Application of the Dep't of Educ., 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041).

In this case, the district argues that the parent did not sufficiently establish that, due to a lack of financial resources, she was unable to front the costs of the student's tuition at Imagine for the 2012-13 school year. A careful review of the evidence supports the district's assertion.

The hearing record shows that the student's mother executed an enrollment contract with Imagine relative to the student's attendance for the 2012-13 school year (Parent Ex. G; see Tr. pp. 237-38). The contract indicated that the total cost of tuition for the 2012-13 school year was \$85,000.00 (Parent Ex. G at p. 1). The parent testified that, in the event that she could not obtain tuition reimbursement from the district she would be unable to pay the tuition on her own, that she did not "have a dollar to pay them, really", but that she took the risk of being obligated to pay the tuition in the event the district did not (Tr. p. 238). An affidavit from an executive associate with Imagine indicates that the parent had not paid any of the student's 2012-13 tuition by December 2012 (Parent Ex. H). The hearing record contains a copy of the student's mother's 2011 federal tax return showing an adjusted gross income in the amount of \$55,088.00 (Parent Ex. L at p. 1). The parent also submitted a copy of the 2011 federal tax return filed by the student father's, showing an adjusted gross income in the amount of \$201,324.00 (id. at p. 3). In addition to the fact that the combined income of the parent and the student's father is not insignificant, the hearing record does not contain any other evidence of their assets, liabilities or expenses during the relevant time period, nor is there evidence of their investments, savings, or other resources that make up their total "financial resources." Based on the combined income, the lack of additional information in the hearing record regarding additional financial resources,

¹⁵ The court in Forest Grove noted that the remedial powers set forth in the statute are also applicable to administrative hearing officers in fashioning Burlington/Carter relief (Forest Grove, 557 U.S. at 244 n.11; see 20 U.S.C. § 1415[i][2][C][iii]).

and the amount of tuition owed for the 2012-13 school year, I decline to order the district to directly fund the student's tuition. Also relevant in this instance is that, the district has already been required to directly pay a substantial portion of the student's tuition at Imagine by virtue of pendency, and the district will be directed to reimburse the parent for any portion of the student's tuition at Imagine for the 2012-13 school year which it has not been required to pay pursuant to pendency.

VII. Conclusion

On review of the evidence in the hearing record, the recommended 6:1+1 special class in a special school with related services was not reasonably calculated to provide the student with educational benefits under the circumstances of this case. I have considered the parties' remaining contentions and find them unnecessary to address in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 10, 2013, is modified, by reversing those portions which found that the district offered the student a FAPE for the 2012-13 school year; and

IT IS FURTHER ORDERED that the district shall reimburse the parent for the costs of the student's tuition at Imagine for the 2012-13 school year upon the submission of proof of payment to the district; and

IT IS FURTHER ORDERED that that at the next annual review regarding the student's special education programming, the district shall consider whether it is appropriate to include parent counseling and training on the student's IEP and, thereafter, shall provide the parents with prior written notice consistent with the body of this decision; and

IT IS FURTHER ORDERED that, if it has not already done so, the district shall, within 60 days, conduct a physical therapy evaluation of the student in accordance with State and federal regulations.

Dated: Albany, New York
December 27, 2013



JUSTYN P. BATES
STATE REVIEW OFFICER